

Development of the human rights situation in Germany July 2017 - June 2018 : Report to the German Federal Parliament in accordance with sec. 2 para 5 of the act regarding the legal status and mandate of the German Institute for Human Rights; executive summary

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German Institute
for Human Rights

Executive Summary

Development of the human rights situation in Germany

July 2017 – June 2018

Report to the German Federal Parliament in
accordance with sec. 2 para. 5 of the Act
regarding the Legal Status and Mandate of
the German Institute for Human Rights

About the report

The German Institute for Human Rights annually submits a report on the development of the human rights situation in Germany to the German Federal Parliament (in accordance with sec. 2 para. 5 of the Act regarding the Legal Status and Mandate of the German Institute for Human Rights of 16 July 2015; short: DIMRG). The report is presented on the occasion of International Human Rights Day on 10 December. The DIMRG provides that the German Federal Parliament officially responds to the report. The third edition of the report covers the period 1 July 2017 to 30 June 2018.

With regard to the requirement of an annual report on the human rights situation in Germany, the Federal Parliament and the Federal Council emphasised: It is a permanent and continuing task of public authorities to respect and realise human rights of all people in Germany. For that reason, the German Constitution demands a regular review of the effects laws can have on human rights and, if necessary, to readjust by means of law making or by changing administrative measures. In addition, new challenges to human rights can emerge – including through political and societal change, international or domestic developments, or scientific and technological progress. Such challenges need to be recognised, solutions in accordance with human rights need to be developed. This report and its future editions intend to contribute to both, human rights impact assessments of laws as well as the identification of new human rights challenges.

All documents and further information about the report are available at: <https://www.institut-fuer-menschenrechte.de/menschenrechtsbericht/menschenrechtsbericht-2018/>

The Institute

The German Institute for Human Rights is the independent National Human Rights Institution in Germany (§ 1 GIHR law). It is accredited according to the Paris Principles of the United Nations (A-status). The Institute's activities include the provision of advice on policy issues, human rights education, information and documentation, applied research on human rights issues and cooperation with international organisations. It is supported by the German Bundestag. The Institute is mandated to monitor the implementation of the UN Convention on the Rights of Persons with Disabilities and the UN Convention on the Rights of the Child and established Monitoring Bodies for these purposes.

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Introduction

This is the third Report on the Development of the Human Rights Situation in Germany presented to the German Federal Parliament by the German Institute for Human Rights. The report covers the period between 1 July 2017 and 30 June 2018.

During the reporting period, Germany underwent the Universal Periodic Review, carried out by the UN Human Rights Council. This extensive human rights monitoring procedure shed light on the manifold human rights challenges faced at Germany's Federal and Federal State level, as identified by the Federal Government, other UN Member States, civil society organisations, and the German Institute for Human Rights. These challenges are described in more detail in the first section of this report, "Germany within the system of international human rights protection".

Additionally, this year's report addresses three areas of concern identified by the Universal Periodic Review, other UN human rights bodies, and the Council of Europe. These areas of concern constitute severe violations of human rights; the voices of those affected are rarely heard in Germany's political discourse.

Section 2 is concerned with people affected by severe forms of labour exploitation; these people suffer from their highly precarious social and financial situation. Migrant workers are at particularly high risk. They are often employed in the construction industry, meat production, the care sector, or in agriculture. Affected persons are paid very low hourly wages without social security, making them financially dependent on their employers. This dependence is often compounded by the migrants' lack of German language skills and knowledge of the German legal system. They are often unable to assert their right to payment of their wages. In order to find out how those affected by these issues may be able to exercise their rights effectively, the Institute investigated which barriers exist in law enforcement and which measures may be helpful, also in light of the experiences gained in other European countries.

Section 3 is concerned with coercion in general psychiatry units for adults. The subjects of this

section are people who live in a psychiatric unit, who receive medical treatment under coercion, or who are forcibly confined, for example by way of physical restraint or isolation. These measures represent serious infringements of fundamental human rights of the persons affected – such as their right to self-determination, liberty and physical integrity. Human rights thus call for a rapid transition to a psychiatric treatment system which forgoes the use of coercion. In order to promote this essential change, the report investigates the state of empirical data on the use of coercion as well as approaches to avoid coercion in the first place.

Germany's obligation to respect and protect human rights applies beyond the country's territorial borders. All states have a duty not to participate in the human rights violations of other states. Armaments carry the risk of being deployed in ways which violate human rights. Section 4 uses three examples, including the conflict in Yemen, to investigate whether the currently applicable standards for arms exports ensure that Germany, in accordance with international law, does not aid and abet recipient countries in the commission of human rights violations.

The last section of the report presents new developments and findings in selected subjects from the previous reports. In this way, the annual human rights reports, when read together, shall give a good overview of the developments in the human rights situation in Germany over the period of several years.

The report relies on various data sources. The German Institute for Human Rights conducted its own qualitative studies in addition to the analysis of publicly available data, statistics, documents and studies, including official documents by the Federal Parliament and individual State Parliaments. The Institute also conducted interviews with those affected by human rights violations, and with experts. We would like to express our thanks to all those we interviewed in the course of our research for this report.

The quality of a country's human rights protection can be measured by whether the rights of the weakest are respected and protected. This

report is intended to serve as a call to the Federal Government and the Federal States to act on the topics the report addresses and, thus, to realise the human rights of everyone.

1 Germany within the system of international human rights protection

The Basic Law of the Federal Republic of Germany sets out inviolable and inalienable human rights (Art. 1 para. 2, Basic Law). Moreover, Germany is firmly integrated into the international and European systems of human rights protection. It has subscribed to international treaties of the United Nations and to European human rights agreements and their control mechanisms.

Chapter 1 of the report describes the most important developments affecting Germany from 1 July 2017 to 30 June 2018.

Germany from the Perspective of Human Rights Bodies and Institutions

During the reporting period, Germany ratified the **Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence** (Istanbul Convention), and thus committed itself to an important convention for human rights protection against gender-specific violence. The Istanbul Convention, which came into effect in Germany on 1 February 2018, was also referred to in the government's coalition agreement. Amongst other activities, a Programme of Action is currently in planning to promote prevention and assistance for women and children affected by violence. There are also plans to improve support structures.

With regard to rulings concerning Germany issued by the **European Court of Human Rights**, the judgement in the case of Hentschel and Stark versus Germany of November 2017 is of particular interest. The proceedings were concerned with a case of suspected disproportionate use of force by the police. The Court found that Germany had violated the prohibition of torture and inhuman or degrading treatment, specifically its obligation to effectively investigate criminal charges. In the

particular case, it was not possible to identify the police officers accused of mistreatment following a football match in Munich due to a lack of individually identifying insignia on their uniforms. The German Institute for Human Rights believes that, as a consequence of this judgement, the federal and state authorities must continue to expand regulations to ensure that police units are required to wear individually identifying insignia, as is already the case in ten of Germany's federal states.

UN Universal Periodic Review

In 2018, Germany underwent the Universal Periodic Review, carried out by the UN Human Rights Council, for the third time. The two previous UPRs took place in 2009 and 2013 respectively. This **routine procedure** is designed to regularly review the human rights situation in all UN member states. **Racism and women's rights** were at the centre of other states' recommendations to Germany. Many states asserted that Germany must continue to prioritise the fight against racist discrimination and violence, including hate speech. In particular, Germany should take measures to prevent racial profiling by the police. States also encouraged Germany to do more with regard to **wage equality between men and women** and opportunities for women to access leadership positions in politics and in the private sector. Moreover, states recommended an increasing commitment in the fight against **gender-specific violence** in Germany. The Federal Government gave a statement in response to these recommendations at the UN Human Rights Council on 20 September 2018. In the statement, the Government supported 209 of the 259 recommendations and, thus, made a political commitment to contribute to their implementation over the next years. The Federal Government and Parliament are now tasked with developing specific measures to that end and with systematically reviewing their implementation.

2 Severe Labour Exploitation in Germany and Wage Entitlements of Affected Migrants

There are cases in which migrant workers in Germany are affected by severe labour exploitation. Affected workers come from Eastern Europe, but also from non-EU countries; the exact scale of the problem is unknown. Advisory services working to support those affected by labour exploitation in Germany have reported increasing numbers of people seeking help. Those affected complain of **wages far below the minimum wage** and that their employers do not pay their social security contributions. Some of them live in degrading accommodation. They are required to **work a large number of unpaid overtime hours**, and their **employers use threats or violence** to prevent them from seeking help or leaving the employment relationship. Reports of cases of severe labour exploitation come from various different industries, including **the construction industry, meat production, the care sector, and prostitution**.

For people affected by labour exploitation, their employers' refusal to pay them has existential consequences which affect their human rights. Despite being in employment, they are forced to live under the poverty line; many of them are at risk for homelessness and thus further exploitation. They also have limited opportunities to assert their wage entitlements in a labour court. The German Institute for Human Rights carried out qualitative research for this report, in order to find out why this is the case and which approaches may be taken to ensure that more people affected by labour exploitation can receive the wages to which they are entitled. **Interviews were conducted with 33 migrant workers** affected by labour exploitation in the last five years. Their accounts were supplemented with **statements made by experts from advisory services for mobile workers, unions and lawyers**.

On the one hand, awareness of severe labour exploitation has risen amongst policy makers and public administrators. Measures – some in

the context of the National Action Plan for Business and Human Rights – have been taken to strengthen the position of workers and enable them to lodge claims for outstanding wages. The measures include **legislative amendments** designed to combat the misuse of temporary work and service contracts, and **industry-specific regulations such as the Law on Employee Protection in the Meat Industry**. The EU Commission is also planning to strengthen the rights of employees, for example by the creation of a European Employment Authority and a reform of the Posting of Workers Directive.

On the other hand, these individual measures do not substantially improve the situation of affected migrant workers. The interviews show **how difficult it is for migrant workers to access labour courts and assert their wage entitlement**.

These people often face language barriers, are unaware of their rights and know little about the German legal system. Their financial hardship and difficulty accessing advisory services compound their situation. If they manage to initiate employment law proceedings, they are severely hampered by the fact that they lack an employment contract in written form, that their employers have forged pay slips, or that there are no supporting witnesses. Even if the labour court finds that they are owed wages, **often the judgement may not be enforced** if the employer declares insolvency, or cannot be traced by the authorities and establishes a new company under another name.

All of these aspects lead to a **structural imbalance between employer and employee**. Other European countries counter this power imbalance by strengthening the position of the employee. Some countries have introduced opportunities for collective redress, for example by way of the right for unions to initiate legal proceedings. This enables unions to enforce minimum labour law standards in the interest of the workers. Other countries have taken this a step further and give their public authorities permission to assert individual wage entitlements on the workers' behalf. There are only a few corresponding legal instruments in German law, and those which already exist are unsuited to creating fundamental change in terms of the workers' opportunities to assert their rights before a labour court.

The German Institute for Human Rights interviewed experts on the legal instruments which could be used to strengthen the enforcement of wage entitlements. Our analysis shows that it is necessary to adhere to a **comprehensive approach** that takes the structural inferiority of those affected into consideration. The approach may include the possibility of **class actions** as well as the legal options of (legal) entities to assert the individual rights of affected persons. It is also necessary to strengthen individuals' legal protection. For that purpose, measures should be examined more closely that **improve access to the courts for those affected, reinforce documentation obligations** for employers offering precarious employment relationships and **ease the burden of proof** for employees. The discussion and development of such a comprehensive approach could be advanced under the leadership of the Federal and State Working Group on Human Trafficking for the Purpose of Labour Exploitation, with the participation of expert groups.

3 Coercion in psychiatric facilities for adults

Everybody wants autonomy in the decisions they make about their health, their person and their body. This is also true of people with psychosocial disabilities. Such individuals may be subject to **various forms of coercion in general psychiatric units**, such as **compulsory hospitalisation** in a psychiatric facility, **forced medical treatment** and other methods, including being fastened to their beds, sedation or isolation. These methods have garnered increasing criticism in recent years: from experts, UN human rights bodies and courts. Coercive measures represent **a serious infringement of a person's physical and emotional integrity**, as well as of their freedom and autonomy.

Among individuals with experience of psychiatric treatment, **there is no unanimous opinion about the use of coercion**, even among those who have been subjected to it themselves. The spectrum encompasses a wide range of opinions, from fundamental objection, ambivalence, to endorsement on the grounds that in certain individual cases one may not be in a position to find

any other way. Psychiatrists and carers partly consider coercive measures unavoidable in particular situations, such as in order to facilitate medical treatment, in cases where a patient represents a danger to him/herself, or in order to protect the professionals caring for the patient. And yet new regulations for medical personnel emphasize the prevention of the use of coercive measures.

International human rights bodies, in particular the UN Committee on the Rights of Persons with Disabilities, support a **complete ban on coercive measures**. Others, such as the European Court of Human Rights, and the German Federal Constitutional Court consider **coercive measures to be acceptable only as methods of last resort ("ultima ratio")** and have formulated strict requirements for their use. Since the year 2011, the **German Federal Constitutional Court** has been investigating the various elements of this issue. In summer 2018, it concluded that the use of physical restraint of patients by way of mechanical devices (straps, harnesses etc.) must be approved by a judge and documented precisely. Specifically, an employee of the facility is to personally attend to the patient at all times and reconsider at regular intervals whether the physical restraint continues to be necessary. Even if Germany does not intend to follow the UN's call to ban the use of coercive measures entirely, it must still review its entire psychiatric care system and make sure that every aspect of this system complies with the principle of the prevention of coercion.

For the purpose of this report, the National Monitoring Mechanism for the UN Convention on the Rights of Persons with Disabilities of the German Institute for Human Rights analysed the following: the fundamental and human rights requirements for general psychiatric units; the current legal situation on coercive measures in Germany; the data available concerning the extent of the use of coercion in German psychiatric units; and promising approaches in order to offer psychiatric care without, or with substantially reduced use of coercive measures.

The findings: **the legal regulations vary widely in different parts of the country**; the requirements of the Federal Constitutional Court have

not yet been fully integrated into national and federal state law. Some federal state laws include other regulations which are problematic from a human rights perspective. For example, a person in Baden-Württemberg may be forcibly held in a psychiatric unit from Friday to Tuesday for up to 120 hours without the approval of a judge – despite the provision in the German Constitution that the deprivation of liberty is to be reviewed immediately by a judge (Art. 104 para. 2 sent. 2, Basic Law).

There is **no reliable data** available on coercion in general psychiatry units in Germany. How many people are affected? Which coercive measures are used by whom and for how long? Statistics only document a small proportion of the coercive measures and compulsory hospitalisations which take place in Germany. However, there are **considerable differences between the federal states** with respect to the number of compulsory hospitalisation in psychiatric facilities per 1000 inhabitants. The rate is much lower in the eastern federal states than in the western ones. The state with the most compulsory hospitalisation procedures in proportion to the population size is Schleswig-Holstein, the state with the least is Saxony. However, when considering these figures, it must be noted that a significant number of coercive measures take place in Germany without court approval – particularly in cases of emergency – thus they are not visible in the statistics available. The approaches adopted by Baden-Württemberg, Hamburg and North Rhine-Westphalia must be positively highlighted: in these states, data on the use and form of coercive measures is collected by the psychiatric units themselves; Baden-Württemberg collects the most extensive data.

The specifications of the UN Committee on the Rights of Persons with Disabilities and of the Federal Constitutional Court place great demands on the German psychiatric care system. How can in-patient and out-patient care be modified so that it avoids coercion and force in the first place? How can a system's facilities, services as well as medical and care personnel gain the capacity to avoid coercion and at the same time create non-violent aid and support structures? How may the patient's wishes and protection of their rights be strengthened?

The report describes a number of **positive developments and concepts**, such as **accessible medical care by way of out-patient services** (community-based mental health services), the **“open door concept” in psychiatric units**, as well as **living wills, medical treatment agreements and crisis plans** which help align a patient's treatment with his/her wishes.

In conclusion, the government and federal states should push for the improvement of care for the mentally ill – as the government proposed in its coalition agreement. With respect to the impetus from the Federal Constitutional Court and the continuing human rights issues surrounding coercion in general psychiatric units, politicians are urged to formulate a binding objective for general psychiatric facilities – that they realign their treatment methods and develop their skill sets to ensure the prevention of coercive methods. The legal framework must also be developed correspondingly. The necessary developments towards freedom from coercion in psychiatric facilities must be accompanied by an institutionalised, well-coordinated and participative process equipped with adequate resources for its purposes. An effective monitoring system must also be set up in order to effectively manage this systemic change.

4 Control of Arms Exports and Human Rights

In the year 2017, Germany was one of the world's five largest arms exporters. From a human rights perspective, **the most controversial arms exports were to Saudi Arabia and the United Arab Emirates (UAE)**, which were the world's second and fourth largest recipients in 2017, respectively. Both countries' human rights situations remain of considerable concern, particularly with respect to the persecution of minority and opposition groups. Both countries have also been leading participants in the conflict in Yemen since the year 2015; **for Germany, they represent an important market for arms exports**. In 2017 alone, the German government authorised arms exports for Saudi Arabia to the sum of €254 million and of €214 million for the UAE. However, both countries obtain the majority of their weapons from other sources.

In the **government's coalition agreement** for this legislative period, the coalition parties have committed to tightening standards for arms exports, to strive for a refinement of the EU's Common Position, and to stop authorising arms exports to states directly involved in the military intervention in Yemen (including Saudi Arabia, the UAE and Egypt). By way of its analysis, the German Institute for Human Rights intends to make a contribution to the government's planned tightening of standards for arms exports.

To this end, the Institute used the **example of the conflict in Yemen** to investigate the extent to which the authorisation procedure is in line with the legal and political requirements for the protection of human rights and of international humanitarian law. In order to do this, the Institute analysed publicly available documents such as government reports, documents published by UN human rights bodies and civil society organisations, and media reports.

In the year 2000, the government created **internally binding criteria** governing the authorisation of arms exports, called the "Political Principles". According to these principles, the authorisation of war weapons and other military equipment (such as tanks, fully automatic firearms, security technology) must be refused if there is probable cause to believe that these weapons will be used for repression or systematic human rights violations in the recipient country, if the recipient country is involved in armed conflict, or if it fails to fulfil its obligations set out by international humanitarian law. Additionally, the recipient must guarantee that the arms supplied are destined to remain in that country ("end-use declaration"), and not for onward transportation to other countries. According to the Political Principles, all authorisation decisions concerning arms exports are made on a case-by-case basis; the government's exact decision-making process is not transparent.

With respect to the example investigated for this report – the authorisation of arms exports to Saudi Arabia and the United Arab Emirates following the beginning of their involvement in the Yemen conflict in 2015 – it becomes clear that the **lack of transparency in the authorisation procedure** is a major cause for concern.

Sources provided by international organisations, academic research and reports from civil society human rights organisations show that exports to Saudi Arabia and the UAE are not in keeping with the provisions contained in the Political Principles. Both countries systematically violate human rights, both have been involved in armed conflict since 2015, and neither Saudi Arabia nor the UAE fulfil their obligations under international humanitarian law, such as the avoidance and/or investigation of military strikes to which civilians fall victim. Nevertheless, the Federal Government at the time continued to grant authorisations for arms exports.

From a human rights perspective, there are also further gaps in the authorisation procedure, such as in **licensed production**. Emerging economies in particular are keen to expand their own arms production using licences. Licence agreements are also subject to authorisation; however once issued, licences may not be retracted, even if weapons produced under licence are put to grossly unlawful use in terms of human rights and international humanitarian law. Another significant gap in regulation is exploited when arms companies based in Germany export their products via **subsidiaries in other countries with less strict authorisation criteria**. An example of this is the company Rheinmetall, which has used subsidiaries in Italy and South Africa to export armaments to Saudi Arabia. German companies thus increase the risk that weapons will be used in violation of international humanitarian law, bypassing the German export control system which should have the power to stop such exports.

In terms of human rights, it would be desirable for the standards to be tightened by way of an **arms export law** that anchors international law and human rights licensing criteria. Such a law should also include subsidiary companies. The Federal Government should also have to **justify its decisions to Parliament** in order to facilitate a more informed discussion about the authorisation procedures. As envisaged in the government's coalition agreement, Germany should also support efforts at EU level for a strengthening of European arms exports rules, and that adherence to these is monitored and their infringements sanctioned.

5 Developments in Issues Covered in Previous Reports

The final section of this report addresses the developments that have taken place in various topics investigated in previous years (2015/2016 and 2016/2017).

Refugees

Family reunification was an issue covered in the last two reports (2015/2016 and 2016/2017). During the current reporting period, there have been further legislative developments: the suspension of family reunification was extended, and family reunification was permitted once again from 1 August 2018 within narrow bounds. Since then, family reunification with those eligible for subsidiary protection has been subject to a quota of 1000 people per month. A respective decision is based on humanitarian criteria that apply on both sides, for family members resident in Germany as well as for those resident abroad. As yet, it is not possible to evaluate the practical application of these criteria. A quota of just 1000 people per month will lead to extended waiting periods if one considers the suspension period of over two years as was previously in effect. The result is that those affected must continue to live with great uncertainty. This increases the risk that the integration of persons who have fled to Germany will be further hampered and in particular in the case of unaccompanied minors, may lead to significant psychological stress.

State authorities' access to **the personal data** of refugees was expanded once again during this reporting period. This includes permission to process data from data media such as asylum seekers' smartphones in order to verify their identity and nationality. Such data processing forms part of the increasing digitisation of the asylum procedure; other newly introduced methods include equipment for automatic facial recognition and dialect identification, as well as for transliteration and name analysis. The processing of refugees' data and the application of technology pursue legitimate goals. However, the proportionality of these measures and the risks for those affected are rarely discussed. The Federal Office

for Migration and Refugees and the immigration authorities rely on the accuracy of these new methods, but it is becoming ever more difficult for those affected to take legal measures against mistakes.

According to the principle of proportionality **assisted repatriation** must take priority over the **deportation** of those who are not entitled to stay in Germany. During the reporting period, the number of those deported was higher than those who made use of schemes for assisted return. At the same time, assisted repatriation programmes were expanded. The funding programme "Perspektive Heimat" (approximately: perspectives in the home country) was designed by the government with the aim of interlinking assisted repatriation with German development cooperation and promoting reintegration in returnees' home countries. And yet figures from the reporting period show increased rates of deportation of those under deportation orders. This raises questions from a human rights perspective on the tightening of legislation (in particular with respect to the increase in the detention of certain groups) and deportation practice (in particular the repeal of the ban on deportation to Afghanistan). The courts must therefore take on increasing numbers of cases concerned with the legality of deportations.

Disenfranchisement of Persons with Disabilities

The report 2015/2016 analysed in detail the disenfranchisement of persons with disabilities at a national and federal state level. There have been positive developments during this reporting period: following the lead of federal states North Rhine-Westphalia and Schleswig-Holstein, three more states – Bremen, Hamburg and Brandenburg – have abolished the exclusion of persons with disabilities for whom a guardian has been appointed for all areas of life; pursuant to the UN Convention on the Rights of Persons with Disabilities. The disenfranchisement of the second group – persons placed in psychiatric care by a criminal court for having committed a crime while exempt from criminal responsibility – was also abolished in those of the mentioned federal states, where such laws still existed. The government's coalition agreement proposes abolishing

disenfranchisement for people with an appointed guardian at a national level, too, but does not mention the latter group (those placed in psychiatric care by a criminal court).

National Action Plan on Business and Human Rights

The development of the National Action Plan on Business and Human Rights (NAP) was one of the main topics of the report 2015/2016. The NAP is now in its second year; it is still too early to analyse its effectiveness in detail, as its processes are still at an early stage. The central question is how companies can implement human rights due diligence, i.e. how they can ensure that their activities do not have harmful effects from a human rights perspective. The government's coalition agreement promises legislative action at the national level in case the company's voluntary commitment to human rights due diligence is insufficient. The government also intends to campaign for a legal regulation of this issue at European level.

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German Institute for Human Rights
Zimmerstrasse 26/27 | 10969 Berlin, Germany
Tel.: +49 30 259 3590 | Fax: +49 30 259 35959
info@institut-fuer-menschenrechte.de
www.institut-fuer-menschenrechte.de
Twitter: @DIMR_Berlin

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Sarah Hanagarth

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German Institute for Human Rights

Zimmerstrasse 26/27
10969 Berlin, Germany

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